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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0967**

State of Minnesota,
Respondent,

vs.

Fardowsa Mohamed,
DBA Hope Alliance Health Care, Inc.,
Appellant.

**Filed February 20, 2018
Reversed and remanded
Cleary, Chief Judge**

Ramsey County District Court
File No. 62-CR-16-2729

Lori Swanson, Attorney General, Nicholas B. Wanka, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Stephen W. Hance, Hance Law Firm, Ltd., Wayzata, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Cleary, Chief Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

In this appeal, appellant argues that the district court abused its discretion in disqualifying her counsel where he is not a necessary and material witness. Because counsel is not a necessary and material witness, we reverse and remand.

FACTS

In 2013, appellant Fardowsa Mohamed began operating Hope Alliance Health (“Hope”), a mental health counseling business. In 2014, appellant was charged with three counts of theft by false representation and two counts of identity theft. A fourth count of theft by false representation and one count of medical assistance fraud were added to the complaint in 2016. The complaint alleges that appellant “defrauded the Medicaid program by billing and receiving reimbursement from the Minnesota Department of Human Services (‘DHS’) and/or UCare for Adult Rehabilitative Mental Health Services (‘ARMHS’) that were not provided, or were not eligible for reimbursement.” Appellant allegedly “billed for services that were not provided and/or were not supported by a [diagnostic assessment],” “presented herself as a clinical supervisor/[mental health professional] when she lacked the required credentials,” and “submitted ARMHS claims to the DHS when the ARMHS were not properly supervised by a [mental health professional] as required by law.”

To be eligible for the Medicaid reimbursement, ARMHS agencies must employ or contract with a mental health professional or a mental health professional clinical trainee who must complete a diagnostic assessment, functional assessment, and an individual treatment plan for each recipient. Minn. Stat. § 256B.0623, subds. 4-5, 8-10 (2016). A mental health professional is a “person providing clinical services in the treatment of mental illness” and has a specialized degree in one of seven areas and certain related experience. Minn. Stat. § 245.462, subd. 18 (2016). A mental health professional clinical

trainee is someone who is either a student in a bona fide internship or someone complying with licensure requirements and under close supervision of a mental health professional who is helping the clinical trainee gain knowledge and skills to practice independently. Minn. R. 9505.0371, subp. 5(C) (2015).

While searching appellant's personnel files, a DHS investigator located a letter from Ruth Katz, a licensed psychologist, stating that appellant was a student pursuing a Master of Arts degree in the Marriage and Family Therapy program at Adler Graduate School at that time and was qualified as a clinical trainee. The letter (Letter A) was addressed to Stephen Hance at a Wayzata address. Katz denies writing Letter A and instead maintains that she wrote and mailed a different letter (Letter B) to Stephen Hance, LCSW (licensed clinical social worker) at Hope's address in St. Paul.

Attorney Stephen Hance represents appellant on all charges. He is not a licensed clinical social worker. In 2015, a former Hope employee faxed Letter A to Hance Law Firm to the attention of a former law firm employee. Upon receiving Letter A, Hance attached the letter to an email sent to UCare's general counsel. Hance maintains that he did not see Letter B until the state provided it to him and that he "did not receive [Letter A] from Ms. Katz" (having received it by fax sent by the Hope employee).

The state filed a motion to disqualify Hance, arguing that he is a necessary witness under Minn. R. Prof. Conduct 3.7 to testify "regarding when and where he first saw each letter," unless appellant would stipulate that she altered the letter originally written by Katz.

The district court determined that Hance is a “material and necessary witness” because “there are contested questions of fact.” This appeal follows.

D E C I S I O N

“We review the district court’s decision regarding disqualification of counsel for an abuse of discretion.” *State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808, 816 (Minn. 2014). A district court abuses its discretion if it enters factual findings that are unsupported by the record, or if it misapplies the law. *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017).

“It is well settled that criminal defendants who do not require appointed counsel have a right to their counsel of choice.” *State v. Patterson*, 812 N.W.2d 106, 111 (Minn. 2012) (citing *Powell v. Alabama*, 287 U.S. 45, 53, 53 S. Ct. 55, 58 (1932) (“It is hardly necessary to say that . . . a defendant should be afforded a fair opportunity to secure counsel of his own choice.”)). “This right derives from the constitutional guarantee that ‘[t]he accused shall enjoy the right . . . to have the assistance of counsel in his defense.’” *Patterson*, 812 N.W.2d at 111 (quoting Minn. Const. art. I, § 6) (citing U.S. Const. amend. VI).

The Minnesota Rules of Professional Conduct provide that an attorney cannot act as a witness and represent a client in the same proceeding unless the testimony relates to an uncontested issue or the value of legal services rendered, or if disqualification would work substantial hardship on the client. Minn. R. Prof. Conduct 3.7.

If the evidence sought to be elicited from the attorney-witness can be produced in some other effective way, it may be that the attorney is not necessary as a witness. If the lawyer’s testimony is merely cumulative, or quite peripheral, or already

contained in a document admissible as an exhibit, ordinarily
the lawyer is not a necessary witness

Humphrey ex rel. State v. McLaren, 402 N.W.2d 535, 541 (Minn. 1987). “The rule does not, however, contemplate that a party can force disqualification of his opponent’s attorney simply by calling him as a witness or stating that he intends to call him as a witness.” *State v. Fratzke*, 325 N.W.2d 10, 11 (Minn. 1982).

The state relies on an unpublished decision, *State v. Casler*, No. C7-02-1848, 2003 WL 22014550 (Minn. App. Aug. 26, 2003), to support its argument that Hance is a necessary witness. That case is inapposite for two reasons. Here appellant and Hance agreed to stipulate to all facts of which Hance has personal knowledge, and several witnesses other than Hance could testify to the chain of custody of the Katz letter, including Katz herself, the former Hope employee, the former law firm employee, and the UCare general counsel. Neither the agreement to stipulate nor the availability of other witnesses was present in *Casler*. Because appellant agreed to stipulate to the foundation of the letter and because Hance’s testimony would be cumulative, we hold that Hance is not a necessary witness and the district court abused its discretion in disqualifying him.

Appellant also argues that disqualifying Hance would work substantial hardship on her. The comment to the rule provides that in determining whether substantial hardship is present, “a balancing is required between the interests of the client and those of the tribunal and the opposing party.” Minn. R. Prof. Conduct 3.7, cmt. 4. The district court did not perform a balancing test. While we need not address this issue, we note that bringing new counsel into a large, complex case such as this with substantial discovery would certainly

significantly impact appellant's interests. Given appellant's right to counsel of her choice, her agreement to stipulate, and the availability of other witnesses, the district court abused its discretion in disqualifying Hance.

Reversed and remanded.